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OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 81-857

TITLE ORALIA MARTINEZ, AS NEXT FRIEND OF ROBERTO
MORALES, Petitioner V. RAYMON L. BYNUM, ET AL.

PLACE WASHINGTON, D. C.

DATE JANUARY 10, 1983

PAGES 1 - 59



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IN THE SUPREME COURT OF THE UNITED STATES

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ORALIA MARTINEZ, AS NEXT FRIEND :
OF ROBERTO MORALES, :
Petitioner :

v. : No. 81-857

RAYMON L. BYNUM, ET AL. :

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Washington, D.C.
Monday, January 10, 1983

The above-entitled matter came on for oral argument
before the Supreme Court of the United States at 10:52
a.m.

APPEARANCES:

EDWARD J. TUDDENHAM, ESQ., Hereford, Texas; on
behalf of the Petitioner.

RICHARD L. ARNETT, ESQ., Special Assistant Attorney
General of Texas, Austin, Texas; on behalf of the
Respondents.

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C O N T E N T S

<u>ORAL ARGUMENT OF</u>	<u>PAGE</u>
EDWARD J. TUDDENHAM, ESQ. on behalf of the Petitioner.	3
RICHARD L. ARNETT, ESQ. on behalf of the Respondents.	29
EDWARD J. TUDDENHAM, ESQ., on behalf of the Petitioners -- Rebuttal.	55

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear arguments next in Oralia Martinez against Raymon Bynum. Mr. Tuddenham, I think you may proceed whenever you're ready.

ORAL ARGUMENT OF EDWARD J. TUDDENHAM, ESQ.

ON BEHALF OF THE PETITIONER

MR. TUDDENHAM: Mr. Chief Justice, and may it please the Court:

This case is in many respects a companion case to last term's decision in Plyler versus Doe. It is another attempt by the state of Texas to exclude unwanted Mexican children from the schools of Texas, and to deter them from migrating to the state.

What the state does here is far less defensible than what it did in Plyler versus Doe. The children that the state is depriving of an education in this case are, in fact, United States citizens. Citizens whose parents are Mexican nationals. But these citizen children have an absolute constitutional right to establish their homes in the United States.

And the mechanism used by the state to exclude these children from school is to define them as non-residents. The statute at issue here states that a child who lives apart from his parents for the purpose of obtaining an education is a non-resident if he is

1 moved apart from his parents in order to obtain an
2 education.

3 QUESTION: Mr. Tuddenham, where in your brief
4 is that statute set out?

5 MR. TUDDENHAM: It is set out -- Your Honor, I
6 believe it's on page 2 of the brief. It's subsection
7 (d), the section challenged here.

8 But of course, it's precisely children like
9 Roberto Morales and other children whose parents are
10 Mexican nationals who must move apart from their parents
11 in order to obtain the education they need if they are
12 to participate in American society and exercise their
13 birthright, their American citizenship.

14 QUESTION: Well certainly, the statute can
15 serve some legitimate purposes, can't it? I don't
16 suppose that wealthy parents can live in a poor school
17 district that doesn't do much in the way of taxing
18 property and have a constitutional right to have their
19 child live with a step-sister in a very wealthy school
20 district.

21 MR. TUDDENHAM: Well, there are several
22 answers to that. If the child is simply commuting from
23 one district to another and, in fact, returns at night
24 to live with its parents, then --

25 QUESTION: No, I'm assuming that the parents

1 don't want to pay the school taxes in the high taxing
2 district, but they want their child to be educated there
3 and they're perfectly willing to have the child take up
4 legal residence with a step-sister.

5 MR. TUDDENHAM: If the child, in fact, moves
6 and establishes a residence with a sister in another
7 school district and residence is the criteria for
8 admission to school, then I should think that that child
9 would have the right to attend school. But I would
10 point out that this statute does more than that.

11 The problem with the example you're giving --
12 and I think it is the essential problem of the case --
13 is this notion that if a child has a choice between two
14 districts, there's something somehow wrong with him
15 choosing one district over another. Well, setting that
16 problem aside for the moment, that's not what this
17 statute prohibits.

18 QUESTION: But doesn't the state have a
19 perfectly legitimate interest in seeing that what you
20 say the statute doesn't prohibit doesn't happen?

21 MR. TUDDENHAM: The state has an interest in
22 protecting its schools from excessive problems of
23 migration, but it can't do that by prohibiting
24 migration. And I think that the problem that you pose
25 is really more in the minds of the school administrators

1 than the evidence in this case would demonstrate. In
2 fact, several states such as New York, Pennsylvania, New
3 Jersey and Connecticut, and I also believe Colorado,
4 have statutes that would allow parents to do just what
5 you have said in your example here.

6 QUESTION: But the fact that New York and
7 Pennsylvania might allow parents to do this doesn't mean
8 that Texas, under the Constitution, has to allow it,
9 does it?

10 MR. TUDDENHAM: Well, I would argue that if
11 the child has a right to travel and a right to establish
12 his home in another district, then he can. But --

13 QUESTION: You would argue, then, that if I'm
14 a parent and live in a very wealthy school district and
15 my 14-year old child -- rather, I'm a parent who lives
16 in a poor district but I want my child to go to a
17 district where there is a good deal better education
18 because of a high tax rate but I don't want to move into
19 that district because I don't want to pay the high tax
20 rate, so I simply farm my child out to a step-sister in
21 the high tax rate district, that the state can't prevent
22 that under the Constitution, because a 14-year old child
23 has a right to travel from one school district to
24 another?

25 MR. TUDDENHAM: To establish a new home, yes.

1 But, Your Honor, understand that in this case, Texas
2 doesn't prohibit what you're saying.

3 QUESTION: Do you think the child has a right,
4 independent of the parent, if the child is
5 unemancipated, to establish his own residency
6 independently?

7 MR. TUDDENHAM: Perhaps, again, where there is
8 a choice between school districts, there might be some
9 grounds for limitation, although I think if there are
10 going to be limitations on a child's constitutional
11 rights as opposed to an adult's, it must have something
12 intrinsic to do with the child, some disability of the
13 child.

14 But the state of Texas has made clear that it
15 does not care whether children move from one district to
16 another to live with a sister, so long as they can come
17 up with some other reason for doing it. And --

18 QUESTION: What is the general test of
19 residency for school purposes in Texas?

20 MR. TUDDENHAM: The only test for school
21 residency in Texas is de facto residence. There is no
22 requirement of prior residence, there's no requirement
23 of intent to remain. All you have to do is be present
24 in the district, and that goes --

25 QUESTION: What do you cite for that?

1 MR. TUDDENHAM: Well, the statute itself
2 simply refers to residence, but last year in Plyler
3 versus Doe the state argued that -- I believe the
4 example was someone coming from Virginia for six months
5 could bring their child and stay for six months with the
6 fixed intention to return to Virginia, and during that
7 six months they would be --

8 QUESTION: Other than the arguments in Plyler.

9 MR. TUDDENHAM: There is also evidence in the
10 record, Your Honor, in the school applications that were
11 submitted as Plaintiff's Exhibit 8. There are a number
12 of examples there.

13 The one that comes to my mind right now is one
14 of a mother who sent her child to live with a
15 grandmother in south Texas for a few months. There was
16 some problem; the mother just couldn't take care of the
17 child at that moment, but was going to come and take the
18 child back to Houston in December after one semester.
19 That child was admitted as a resident.

20 QUESTION: What do you say the state does
21 prohibit that it can't?

22 MR. TUDDENHAM: What it prohibits is -- the
23 state says that a child can establish residence apart
24 from its parent or guardian for any reason it wants to.
25 So they have no problem with the capacity of the child

1 to establish residence apart from its parent. It simply
2 then takes one class of those children and says you
3 cannot establish residence apart from your parents
4 because you've come for the purpose of obtaining an
5 education.

6 And to go back to your question, Justice
7 Rehnquist, the fact that the state may have a legitimate
8 concern about children district-hopping, I believe is
9 the way the respondents referred to it, this statute
10 doesn't stop that. If a parent has enough money to
11 obtain a guardianship, or if he can concoct a reason
12 other than the need for an education, then the child can
13 transfer.

14 QUESTION: Yes, but I suppose if
15 district-hopping is what they want they may have a tough
16 time coming up with a phony reason that passes muster.

17 MR. TUDDENHAM: Well, the district court found
18 that any reason would suffice; any reason other than the
19 desire to obtain an education.

20 QUESTION: But if, in fact, the reason is the
21 desire to obtain an education, I suppose that whoever
22 decides whether the reason is true or not would make
23 some inquiry into that.

24 MR. TUDDENHAM: Well, there is inquiry into
25 what is your purpose for being here. And if the purpose

1 -- very often, in moving from one district to another,
2 from one state to another, that purpose may represent
3 educational needs as desperate as Roberto Morales'.

4 What has happened here is Roberto Morales has
5 no other school that he can attend. He is not being
6 precluded from choosing one district over another. He --

7 QUESTION: Counsel, may I ask you a question?
8 Are you making a facial attack on this statute, or as
9 applied to a particular client?

10 MR. TUDDENHAM: Well, in the district court we
11 amended our complaint to drop the claim that the statute
12 is being discriminatorily applied.

13 QUESTION: So you're not arguing that the
14 statute has been applied discriminatorily, are you?

15 MR. TUDDENHAM: That is correct. But on its
16 face, --

17 QUESTION: And Judge Garza found as a fact
18 that it was not being so applied, didn't he?

19 MR. TUDDENHAM: I believe his finding was that
20 if you had any other reason for getting in, they would
21 let you in. There was no statistical evidence to show
22 that --

23 QUESTION: He didn't find any discriminatory
24 enforcement, did he?

25 MR. TUDDENHAM: That was not presented to

1 him. That issue did not come up. There was no analysis
2 done of the school applications to show that children
3 coming from Mexico were excluded more frequently than
4 children coming from other states or --

5 QUESTION: But on the face of the statute, it
6 applies equally to children coming from Mexico as it
7 would to children coming from any other school district
8 in the state, wouldn't it?

9 MR. TUDDENHAM: Absolutely, it does. But the
10 legislative history makes clear that the purpose for
11 this statute was to deter migration. It was not to
12 control inter-district transfers. It was to deter
13 migration from Mexico, to keep children whose parents
14 cannot enter the country from coming here because
15 they're citizens and obtaining an education.

16 QUESTION: Counsel, I was going to ask exactly
17 the same question, because I think the record for me is
18 somewhat confusing as to whether you were making a
19 facial or an as-applied challenge, and I take it your
20 answer to Justice Powell is that now you're making a
21 facial challenge.

22 MR. TUDDENHAM: It is a facial challenge, but
23 on its face --

24 QUESTION: What do you do, then, about the
25 boarding house situation?

1 MR. TUDDENHAM: Boarding home situation? The
2 state could deal with that if that is a problem. The
3 state could deal with that in any number of less
4 restrictive ways. Many states, for instance, make the
5 reasonable assumption that who is providing the care and
6 clothing for the child is -- in other words, who's
7 supporting the child -- is a legitimate criteria to look
8 at to determine the child's residence.

9 And that would be a far less broad definition,
10 and it would take care of the boarding home problem
11 because, of course, the boarding home would be a
12 commercial operation receiving pay from the parents.

13 QUESTION: Does the record show that this
14 petitioner intends to stay in the United States after
15 he's been educated?

16 MR. TUDDENHAM: The record states that he
17 intended to stay until he completed his high school
18 education. When we submitted that evidence, Roberto
19 Morales was nine years old and didn't really know what
20 he wanted to do. Last week when I talked to him he said
21 he wanted to grow up and be a doctor and live in McAllen.

22 QUESTION: Well, this takes us right back to
23 the question I think that was implicit in something that
24 Justice O'Connor asked. Who's boss here, the parents or
25 the child?

1 MR. TUDDENHAM: I think this has to be looked
2 at -- it's a family situation. Obviously, when a child
3 is nine, Roberto Morales may or may not have known what
4 was in his best interest. His parents, I think,
5 recognized that since he was a United States citizen and
6 he was going to live in the United States as an adult,
7 he had to learn how to speak English. And he couldn't
8 wait until he was 18 and could make up his mind to move
9 to the United States and learn English then, because by
10 then it would be too late.

11 These people are indigent and they cannot
12 simply move at age 18 and start adult education
13 classes. So his parents were the ones, I imagine, when
14 he was nine who, as a family, made the sacrifice to send
15 their child away so that his life would not be forever
16 stigmatized by the fact that he did not learn what it
17 was to be an American citizen.

18 QUESTION: I suppose it's irrelevant, but how
19 did he happen to be born in the United States?

20 MR. TUDDENHAM: That is not in the record,
21 although the way this comes up is the parents are either
22 here temporarily -- Mexican parents are either in Texas
23 temporarily on visas or they're here illegally. But
24 when the child is born in the United States, he then
25 becomes a U.S. citizen.

1 And that brings up an important comparison
2 between this case and Plyler, because I think what's
3 going on here, what was in the minds -- or what the
4 legislative history indicates -- is that the reason
5 these children are being excluded from school is the
6 notion that somehow, they really aren't U.S. citizens.
7 That they were born here because their parents managed
8 to get across the river, and for that reason, they can
9 be deprived of the education that is made available to
10 all other citizens of Texas.

11 QUESTION: What would be your argument if the
12 child was not a citizen.

13 MR. TUDDENHAM: Well, if he were entering,
14 say, on a visa, say, if the federal government had
15 granted him a permanent residence visa --

16 QUESTION: No, not permanent. Suppose they
17 just let him in to get an education.

18 MR. TUDDENHAM: Well, if he came in legally,
19 under the federal immigration laws I should think that
20 there would be a supremacy problem for the state then --

21 QUESTION: Well, you'd be making the same
22 argument, wouldn't you?

23 MR. TUDDENHAM: If he had entered legally I
24 would be making the same argument. Now, there would be
25 the additional argument that if the federal government,

1 in its exercise of its powers of immigration, had
2 decided that it was all right for this child to enter
3 the country, then the state could not burden that right
4 by then saying well, you can come into the country, but
5 if you've gotten permission to come in to go to school
6 we're not going to let you in the school.

7 QUESTION: So the fact that this child is a
8 citizen is rather irrelevant, isn't it?

9 MR. TUDDENHAM: Only that his right is not a
10 supremacy right of immigration; it's that he is a
11 citizen. He has a right under the Constitution to enter
12 this country and live here.

13 QUESTION: Well, it's irrelevant to your
14 argument. I'm sure it's not irrelevant generally.

15 MR. TUDDENHAM: Well, perhaps if he is
16 entering illegally for the purpose of attending school,
17 the state could draw a narrower statute to exclude those
18 children.

19 QUESTION: Under Plyler?

20 MR. TUDDENHAM: Well, there is a footnote in
21 Justice Powell's concurrence with respect to if the
22 child is entering for the purpose of attending school,
23 then you could make a pretty good logical argument that
24 excluding him would be consistent with the federal
25 policy of deterring immigration. That is, if he's

1 , coming by himself because they're the only children
2 being affected by this statute.

3 But his citizenship is what gives him the
4 right to come into the country, and that right -- what
5 I'm arguing is that that right cannot be conditioned
6 because the state doesn't approve of his reason for
7 coming here.

8 QUESTION: To what extent do you rely on a
9 constitutional right to travel?

10 MR. TUDDENHAM: It is our argument that this
11 case should be reversed based on the same equal
12 protection analysis utilized in Doe v. Plyler. But
13 here, this Court should apply strict scrutiny because it
14 is his fundamental right to travel that is being
15 burdened, in addition to the fact that he is being
16 deprived of an education.

17 QUESTION: So you must be taking the position
18 that a child of three, four, five, six years of age has
19 the same constitutional right to travel as an adult
20 citizen.

21 MR. TUDDENHAM: Obviously, children's rights,
22 to a certain extent, are not co-extensive with an
23 adult's rights. But what I would submit here is that
24 there is no reason shown in this record for limiting
25 Roberto Morales' right to travel.

1 The state of Texas has already decided under
2 its probate code that there is a responsible adult
3 taking care of him. His sister is perfectly okay with
4 the state of Texas. If he is moving from Louisiana or
5 from Peru, if he comes and lives with his sister, the
6 state of Texas thinks that's just fine, as long as he
7 isn't coming for the purpose of attending school.

8 So there's nothing intrinsic about the fact
9 that he is a child that argues that his right to travel
10 should be --

11 QUESTION: Texas doesn't object to the right
12 to travel back to Mexico, does it?

13 MR. TUDDENHAM: No, it does not, Your Honor.
14 In fact, that's precisely what the state of Texas
15 suggests. They suggest that there is no deprivation of
16 education here because Roberto Morales can go back to
17 Texas. And they recognize that if he does not have an
18 education, he can't just sit in McAllen on the streets
19 all day, although he did that for one year.

20 For one year he stayed in McAllen waiting to
21 become eligible for school. Even though with the
22 strictest one-year residency requirements which were
23 struck down in Shapiro and Dunn and in Maricopa County,
24 he would have qualified as a resident after waiting that
25 year.

1 But under this statute, he is still called a
2 non-resident even after five and a half years of
3 continual residence. He is absolutely indistinguishable
4 from any other resident in Texas, any other child living
5 with a custodian, and the sole reason that he's -- his
6 motive.

7 QUESTION: Do you think that the state has a
8 legitimate interest in requiring children who are living
9 apart from their parents to live with a legal guardian
10 as a pre-condition to admission to public school?

11 MR. TUDDENHAM: The state has a legitimate
12 interest in assuring that the child lives with a
13 responsible adult. Absolutely. But the state of Texas
14 has determined that Roberto Morales' sister is a
15 sufficiently responsible adult under the state laws.
16 Now, under --

17 QUESTION: You think it would be valid for a
18 state to say if the child is living apart from the
19 parents, we require as a condition of going to school
20 that the child be living with a legal guardian?

21 MR. TUDDENHAM: It would depend on their
22 reason for requiring that. If the reason for requiring
23 a guardian --

24 QUESTION: Well, what can we assume? That the
25 child might need medical care and might need other

1 permission to be given for various activities, and the
2 school needs to be able to look to someone who is
3 legally in a position to do those things.

4 MR. TUDDENHAM: Absolutely, the state has an
5 interest in doing that. But if the state law will allow
6 a custodian to do all of those things, as it does in
7 Texas, then the guardian would not be needed for those
8 purposes.

9 QUESTION: Does the record show that when this
10 child was admitted -- what did the sister sign on the
11 application blank? I assume that Texas has an admission
12 card.

13 MR. TUDDENHAM: No, there are no admissions
14 cards. At the time that this child --

15 QUESTION: They have no records?

16 MR. TUDDENHAM: The only records that were
17 kept were kept by order of the district court, and that
18 was after Roberto Morales had first applied.

19 QUESTION: Well, what record does the school
20 have as to who to call up if this child drops dead?

21 MR. TUDDENHAM: Oh, the child is in school now
22 and they have his sister, Oralia Martinez's, name.

23 QUESTION: As what? Guardian?

24 MR. TUDDENHAM: As custodian.

25 QUESTION: Custodian.

1 MR. TUDDENHAM: I think the way it's referred
2 to in the statute is person having lawful control.

3 QUESTION: I'm not interested in the statute;
4 I'm interested in this case. Does this record show what
5 position she has insofar as the school is concerned? If
6 she is a legal guardian she's one thing. If she is a
7 disinterested passerby, she's another thing.

8 MR. TUDDENHAM: So far as the school is
9 concerned she is not a disinterested passerby.

10 QUESTION: Well, is that in the record?

11 MR. TUDDENHAM: It is in the record that the
12 state schools accept children who live with relatives,
13 or friends even.

14 QUESTION: Well, does it show that she signed
15 as a relative, as a parent, as a substitute parent, or
16 what?

17 MR. TUDDENHAM: When a child applies to school
18 -- it's not in the record, but I imagine that they would
19 get the name of the parent, or whoever the child is
20 living with, and -- but what I would show the Court is
21 that it is clear under the statute and through the
22 applications kept in the -- as Plaintiff's Exhibit A --
23 that the school districts do admit children if they are
24 living with non-guardians; with relatives or friends.
25 And whatever the paperwork the school does to assure

1 that they have the names of those people is done.

2 The district court found, as a finding of
3 fact, that the sister was entitled to give medical
4 permission and other kinds of permission for the child.
5 I know the school has her name now.

6 QUESTION: May I ask you a question? I
7 understood you to say a moment ago that the child was in
8 school now. Is that right?

9 MR. TUDDENHAM: That is correct. He is --

10 QUESTION: Is that pursuant to court order, or
11 how does --

12 MR. TUDDENHAM: It's an injunction pending
13 appeal. Yes, Your Honor.

14 QUESTION: I had missed that in the papers.

15 MR. TUDDENHAM: He was out of school for a
16 year and then the injunction came and he was admitted.

17 QUESTION: And the court of appeals left that
18 injunction in force and has not ruled against you.

19 MR. TUDDENHAM: That is correct.

20 QUESTION: I see.

21 QUESTION: Counsel, you rely on the
22 fundamental right to travel. Does that mean that in the
23 United States a child may pick any school district it
24 wishes to pick, so long as it complies with the
25 residence provisions of that school district, or has a

1 constitutional right to go there, regardless of where
2 his parents may live?

3 MR. TUDDENHAM: In the first place, a child's
4 right to travel is obviously limited by the parents'
5 wishes.

6 QUESTION: Well, perhaps not in this case, but
7 there may be many similar cases.

8 MR. TUDDENHAM: But I would suggest to the
9 Court that that --

10 QUESTION: Let's take my simple question.
11 Suppose a child lives very close to a state that has
12 excellent schools. I think Justice Rehnquist suggested
13 this sort of problem. He lives right close to the
14 boundary line. By going across, the child can attend
15 schools of much superior quality. You suggest he has an
16 absolute right to go?

17 MR. TUDDENHAM: Well, let me answer that first
18 by saying that is not necessarily the case before the
19 Court here. The case here is the child has no other
20 choice.

21 QUESTION: I know. I'm going back to your
22 statement.

23 MR. TUDDENHAM: Okay. But leaving that aside,
24 if the parent and the custodian, whoever it is, and the
25 child have made the decision that this is what is in the

1 best interest of the child, to give up living with his
2 parents, give up the day-to-day -- the parents giving up
3 control over the day-to-day upbringing of their child,
4 then I would think that there would be a strong argument
5 that the state would have to show a compelling interest
6 to interfere with that choice.

7 However, that's not the case here. Also, I
8 would point out that this statute does not stop that in
9 any way. It only stops that for indigents. If they can
10 afford a guardianship, they can do it now, and the state
11 of Texas doesn't care.

12 QUESTION: But you have people here in your
13 case who are perfectly willing -- if they were willing
14 to accept the child, the child could attend the
15 schools. But they elect not to do so.

16 MR. TUDDENHAM: If they were willing to become
17 guardians.

18 QUESTION: Yes.

19 MR. TUDDENHAM: Even if they were -- there are
20 problems with the guardianship requirement in Texas in
21 that it could mean giving up permanent custody of the
22 child, such that it would require a second proceeding to
23 get custody of your child back. But even so, the
24 expenses involved in obtaining a guardianship are
25 considerable for an indigent. They may, in fact, be far

1 greater than the cost of tuition.

2 QUESTION: Do you have legal aid in this
3 county?

4 MR. TUDDENHAM: There is legal aid, Your
5 Honor, but as the people are rejected under -- in
6 Plaintiff's Exhibit A, the 30 examples of people
7 rejected, most of those people did not make it to our
8 doors for help.

9 QUESTION: Are you suggesting that the
10 fundamental right to travel on which you rely applies
11 only to indigents?

12 MR. TUDDENHAM: No, it applies to all. I'm
13 simply pointing out that what your -- the concern of the
14 Court in terms of people choosing districts is going on
15 every day right now for everyone but indigents. And I
16 don't think that recognizing the right of indigents to
17 move to obtain an education is going to substantially
18 affect the school districts in this country.

19 QUESTION: I'm not sure I understand why this
20 is limited to indigents. Supposing you have an American
21 family living in Mexico City, a very wealthy family, but
22 they don't like the schools there and they want to send
23 their wealthy child to this school in this school
24 district and they have a friend who will take the child
25 in. The only way they can do that, as I understand it,

1 is have a guardian appointed, and you said well, you
2 can't do that without severing the parental relationship.

3 MR. TUDDENHAM: They could also pay tuition.

4 QUESTION: But supposing it doesn't happen to
5 be a private school in this district. They don't have
6 to -- say they don't want to pay tuition. They want to
7 go to this school. They have a very good faculty and a
8 good student body and a good football team. They have a
9 constitutional right to do it, don't they?

10 MR. TUDDENHAM: Is this a United States
11 citizen child?

12 QUESTION: Yes. And United States citizen
13 parents who, for personal reasons, live in Paris or
14 London or someplace. Don't they have the same
15 constitutional right that you're talking about here?

16 MR. TUDDENHAM: Yes, they do. And in fact, a
17 child like --

18 QUESTION: So indigency really has nothing to
19 do with the case.

20 MR. TUDDENHAM: Well, the only reason that
21 indigency comes up is that those parents can do that
22 right now by paying the minimal amount of tuition --

23 QUESTION: But they say they don't want.

24 QUESTION: They don't want to. They'd rather
25 use their money for something else.

1 MR. TUDDENHAM: If they would rather stand on
2 their constitutional right, I suppose they could.

3 QUESTION: You would represent them?

4 MR. TUDDENHAM: No, they wouldn't be eligible.

5 QUESTION: But when you said constitutional
6 right, their constitutional right to travel that I had
7 put to you before?

8 MR. TUDDENHAM: That's right. The
9 constitutional right to travel; travel in the sense of
10 move and to create a home, to live and abide in that
11 place. Establish your home there.

12 QUESTION: Now, if this Court should decide
13 that an infant child has no constitutional right to
14 travel, does that wash your case out?

15 MR. TUDDENHAM: No, I don't believe so because
16 still, under Doe v. Plyler, this child is being
17 absolutely deprived of an education in a place where he
18 lives. The state of Texas can't deport him from
19 McAllen. They might exclude him from school, but they
20 cannot deport him. He's a citizen. And under the laws
21 of Texas he can live with his sister and continue to
22 live there with his sister.

23 QUESTION: But as a constitutional matter,
24 could not this particular -- could not Texas require
25 that if any child is to live separate and apart from his

1 parents, he must have a legal guardian appointed? As a
2 constitutional matter, could they impose --

3 MR. TUDDENHAM: It would depend on their
4 reason for doing it. If the sole reason for doing that
5 was to determine --

6 QUESTION: The reason that Justice O'Connor
7 referred to, they want to have someone who is legally
8 responsible for decisionmaking on behalf of the child.

9 MR. TUDDENHAM: If that were the reason I
10 should think that would be constitutional. But Texas
11 doesn't need a guardian to do that. Texas has decided
12 that the custodian is sufficient for that purpose.

13 QUESTION: Well, it's interesting, though,
14 that you have stipulated in this case that none of these
15 children live with his or her parents or a legal
16 guardian, or a person having lawful control of him or
17 her, on the order of the court.

18 MR. TUDDENHAM: By order of the court.

19 QUESTION: That none of them has a parent,
20 legal guardian or other person having lawful control of
21 them under an order of court, living within the school
22 district.

23 MR. TUDDENHAM: That's the statutory language,
24 Your Honor. There is a distinction made between a
25 person having lawful control, which is a sister, a

1 custodian -- and that's accepted by the state of Texas
2 -- and a person having lawful control by order of
3 court. There is no such beast under the laws of Texas.
4 That's a guardian. That's just the statutory language.

5 He is living with a person who has complete
6 legal authority over him, under the laws of Texas.
7 There is no question about that. The only reason he's
8 being excluded from school --

9 QUESTION: Not if -- not contrary to the
10 wishes of the parents.

11 MR. TUDDENHAM: If it were -- that's right,
12 that would be a different case. But that's not this
13 case. The parents here want him to be able to obtain an
14 education.

15 QUESTION: Do you think your statement is
16 consistent with the stipulation of fact that Justice
17 White just read to you?

18 MR. TUDDENHAM: Absolutely. The court order
19 -- the person having lawful control under order of court
20 is the statutory language to distinguish that from a
21 person who simply has lawful control. If you're with
22 someone under lawful control by order of court, then you
23 can go to school even if you have the prohibited
24 motive. If you're simply living with a sister, whom the
25 state recognizes has lawful control, then you can't go

1 to school if you have the prohibited motive.

2 I'll reserve the rest of my time for rebuttal.

3 Thank you.

4 CHIEF JUSTICE BURGER: Mr. Arnett.

5 ORAL ARGUMENT OF RICHARD L. ARNETT, Esq.

6 ON BEHALF OF THE RESPONDENTS

7 MR. ARNETT: Mr. Chief Justice, and may it
8 please the Court:

9 I think first we probably ought to straighten
10 out the history of this provision. It was codified in
11 1977; however, this is a rule of Texas law that dates
12 back at least to 1905. It's a rule of American law that
13 dates back at least to 1851 in what was apparently the
14 first school residence case in the nation. It was
15 introduced into jurisprudence by the New Hampshire
16 Supreme Court at that time.

17 In 1905, the Texas attorney general's opinion
18 expressly relied on this rule, stating that the child
19 was not entitled to go to school in a little town called
20 Rockdale in central Texas if the main purpose of the
21 child being there was to obtain an education in that
22 district, and this child did not live with parents or
23 guardians.

24 He equated the main purpose of being there for
25 an education with an ostensible residence as opposed to

1 substantial residence.

2 Just to show the dissimilarity of this rule of
3 law with the rule of law at issue in Plyler versus Doe,
4 some 15 years later while this rule was still in effect
5 in Texas, the Texas attorney general ruled that they
6 also had to admit any illegal aliens in the school. It
7 didn't matter -- and you'll find that in the record of
8 the Plyler case, reference to that 1920 decision in the
9 1975 opinion of the attorney general.

10 In 1973, this question recurred -- the
11 question in this instant case -- recurred several times,
12 right on up until 1973 where the attorney general
13 reviewed all the decision up to date and reiterated that
14 the test for residence in Texas to go to school is not
15 domicile, it's not an intent to remain permanently, it's
16 what is termed a bona fide residence, and a bona fide
17 residence can be acquired apart from a parent or
18 guardian if your purpose for residing in that district
19 and being present in that district is not for the
20 primary purpose of going to school.

21 And Justice O'Connor, that is the Texas test
22 of residency and has been now for 77 years at least.
23 For school purposes.

24 QUESTION: By case law?

25 MR. ARNETT: By administrative

1 interpretation. These were advice from the attorney
2 general to the Texas -- to the education, to the state
3 agency, as to what children were required to be admitted
4 by the various local school districts.

5 QUESTION: Is it a de facto residency?

6 MR. ARNETT: It's not simply de facto. It is
7 what is termed a bona fide residency, and you see that
8 occurring throughout the opinions of this court as well.

9 QUESTION: But can you be a bona fide resident
10 for six months for purposes of getting a free public
11 education? Somebody who goes temporarily to Texas?

12 MR. ARNETT: Not if your primary purpose is to
13 obtain an education. But if your primary purpose
14 happens to be that you need to be there for some other
15 reason, -- let's say health; you need to go down to
16 Texas for treatment for six months -- then yes, you
17 would be admitted to school. And it has been that way
18 in Texas, as I say, for 77 years.

19 This has been advice to the state
20 superintendent of education at that time, back in 1905.
21 This is also stated by the Court of Civil Appeals in the
22 DeLeon case which also preceded this codification. And
23 that DeLeon case, also, in that case, the Court of Civil
24 Appeals for Corpus Christi said that that was really
25 what they meant to say in Gamboa as well, which Gamboa

1 has some dicta that tends to go the other way.

2 QUESTION: What if parents decide that they
3 like the public schools in Corpus Christi, Texas and
4 they decide to move from New Mexico to Corpus Christi,
5 Texas so their children can attend the public schools
6 there, and for no other purpose. Is that all right?

7 MR. ARNETT: Yes, Your Honor, that is all
8 right.

9 QUESTION: Because they're with their parents.

10 MR. ARNETT: Yes, Your Honor, because when
11 their parents move into that district as a family unit
12 on another situation where a child resides with the
13 guardian -- and the reason we have a guardianship
14 provision is some children need to have guardians.
15 Application for guardianship in Texas has to specify the
16 necessity for a guardian's appointment, so it's not at
17 all clear that the statute can be frustrated in the
18 method contemplated and suggested by the petitioner.

19 But getting back to your question, you have a
20 Shapiro type of case there. You have a family
21 relocating for all purposes. Now, their primary purpose
22 may be to change school districts, but on the other
23 hand, --

24 QUESTION: Under my assumption, that is their
25 only reason.

1 MR. ARNETT: Okay. But at the same time, they
2 have joined the polity of that district, for 100 percent
3 of all purposes. They can vote there, they are going to
4 live there, they're presumably going to work there.

5 QUESTION: They're going to pay the taxes, too.

6 MR. ARNETT: They're going to pay taxes there,
7 their work is going to support the local economy there.
8 They as a family unit reside in Corpus Christi, whatever
9 their reasons are. The parents will be participating in
10 the local school district or certainly will have the
11 right to, will be voting for the school board. And to
12 that extent, that's fully consistent with our concept of
13 democracy. It doesn't really matter why someone as a
14 family unit moves there. Children are different.

15 QUESTION: What if the family from New Mexico
16 doesn't want to move into Texas, but they want to send
17 their child down there, and they say what's your
18 tuition, and you tell them and they say, we'll pay it.

19 MR. ARNETT: That's a local option matter.
20 School districts are not required to allow anyone in the
21 school.

22 QUESTION: Well, do some districts permit that?

23 MR. ARNETT: I think probably most districts
24 do it.

25 QUESTION: All right. If you can pay a

1 tuition.

2 MR. ARNETT: That's right.

3 QUESTION: And they would be the only people
4 who would be paying a tuition; otherwise, it's free,
5 isn't it?

6 MR. ARNETT: Not necessarily. There can be
7 transfers from other districts where they don't even
8 reside -- don't even live in that district but their
9 parents --

10 QUESTION: They commute.

11 MR. ARNETT: They commute. And districts can
12 take them under Texas law, subject to a review by the
13 agency to insure that there is no intentional evasion of
14 a desegregation order.

15 And I would like to throw that in here,
16 because if you want to know what this case will really
17 do in Texas. You will have districts -- you will have
18 children hopping all over the state to avoid busing
19 orders.

20 You know, for example, I --

21 QUESTION: You mean if you lose the case.

22 MR. ARNETT: If we lose the case, that's
23 right. And --

24 QUESTION: You mean we've got to decide busing
25 again?

1 (Laughter.)

2 MR. ARNETT: No, sir, we don't have to decide
3 whether -- the propriety of it, but just where a federal
4 court has ordered it --

5 QUESTION: Did you ever heard of a red herring?

6 MR. ARNETT: Well, Your Honor, I have three
7 sisters that have kids in different school districts in
8 Texas. All three of those districts bus children. My
9 district does not. Now, I think it's folly to consider
10 that --

11 QUESTION: But busing is not here, is it?

12 MR. ARNETT: Busing is in many Texas school
13 districts, and --

14 QUESTION: Is busing in this case?

15 MR. ARNETT: Impliedly, it is, Your Honor,
16 because it is an incentive to change school districts.

17 QUESTION: Impliedly, guns are too, aren't
18 they? You can imply anything.

19 MR. ARNETT: It certainly will be one of the
20 common reasons that would be utilized and would motivate
21 people to change school districts on the part of their
22 children.

23 There'd be other reasons. If they like the
24 athletic program.

25 QUESTION: Did this child change because of

1 busing? Did anybody in this district change because of
2 busing?

3 MR. ARNETT: You'll find nothing in the record
4 to support many of the statements that have been made up
5 here, and there's certainly nothing in the record to
6 answer your question with. There's nothing in the
7 record to indicate that this child won't get an
8 education or wasn't getting an education before he came
9 across the border. When we raised that in our reply
10 brief, they replied by saying well, but he can't learn
11 English.

12 So I assume that this enhanced scrutiny that
13 goes with the right to an education is now going to go
14 forward to the right to learn English. Is it going to
15 go forward to the right to take Calculus 2 in another
16 district? I mean, there must be a stopping point
17 somewhere, and --

18 QUESTION: Well, I suppose Texas could adopt a
19 residency requirement for public school purposes that
20 would require residency in the normal sense of going
21 with an intent to remain indefinitely. Right? I mean,
22 isn't that possible?

23 MR. ARNETT: It would be possible. We don't
24 think that's very wise because that would cut an awful
25 lot of children out of school who really need to be

1 there.

2 QUESTION: Isn't that what most states do?

3 MR. ARNETT: No, Your Honor, it's not what
4 most states do. Most states either go a parent or
5 guardian residence restriction, or parent or guardian
6 along with the Texas system of allowing custodial
7 relationships as long as it's not for the purpose of
8 going to school.

9 In this regard, I'd like to point out --

10 QUESTION: Let me just ask you one more
11 question in response to your response to Justice
12 O'Connor. I suppose if a person teaches in college, he
13 may get a visiting professorship for a year and maybe
14 wants to move into your district with his children. You
15 have a college there where he would be teaching for a
16 year.

17 Now, if there were a domicile requirement of
18 intent to remain indefinitely, he couldn't meet that,
19 and yet he would certainly be a bona fide resident, I
20 suppose, in terms of your statute, for a year, wouldn't
21 he?

22 MR. ARNETT: That's right. He wouldn't have
23 any problems. In fact, our statute is -- as we believe,
24 it's the wisest type of statute you can have because it
25 lets children go to school where they need to be, but

1 doesn't create state incentives to send them different
2 places. Otherwise, you do.

3 Now, very, very few states in this nation --
4 indeed, I haven't found a single case in my research
5 where they use the wide-open, temporary de facto rule.
6 And I believe that you will have to go to a rule like
7 that, as a matter of federal constitutional law for all
8 50 states in order to strike the Texas statute.

9 Because certainly, if the parents or
10 guardians-only laws, which are at issue in several other
11 states, are constitutional, then Texas's more liberal
12 law, -- or it would seem certainly would be -- or at
13 least it would take care of the right to travel
14 question. If the child doesn't have a right -- if the
15 parents don't have a right to send the child, the child
16 doesn't have a right to go, for example, in one of these
17 states that restricts it to parents or guardians only,
18 to another district other than where his parents or
19 guardian resides, then that fairly well ends the right
20 to travel question. It ends any inquiry concerning the
21 first classification in this statute, and that is
22 custodians versus guardians or parents.

23 The second classification in this statute
24 deals with the purpose for the residence. Now, it would
25 seem that when you are adopting a more progressive,

1 liberal approach than you're required to, that absent a
2 suspect classification -- and I don't believe there are
3 any cases in this Court to indicate that the test of
4 purpose would be suspect -- that should only be reviewed
5 under a rational basis standard.

6 And I believe that we have -- well, in fact,
7 the court of appeals said we had a compelling state
8 interest in this test. And certainly, we have vastly
9 more than a rational basis to try to prevent students
10 from jumping all over the state from district to
11 district, or students coming in across state lines for
12 only the reason of going to school without their parents
13 and without a relocation of the family unit and
14 participation in the democratic process in Texas.

15 QUESTION: Is the amount of the tuition in the
16 record, that you would have to pay if --

17 MR. ARNETT: This child is paying tuition, by
18 the way. This idea of an injunction pending appeal is
19 truly a red herring. The child is attending school
20 because they posted a bond to cover his tuition.

21 QUESTION: So what is the tuition?

22 MR. ARNETT: The bond they posted was \$1244.
23 I don't know if the record expressly states what the
24 tuition is. Normally, it's around \$1000 in Texas school
25 districts. That's about what they would get from the

1 state, although I think McAllen probably --

2 QUESTION: So this rule really does have an
3 incidence on people who can't pay the tuition.

4 MR. ARNETT: If the district -- but that's not
5 the statute.

6 QUESTION: You can move into the district for
7 an education anytime you want to pay for it.

8 MR. ARNETT: Let me differentiate between the
9 district's policy of accepting children with a tuition,
10 and the state statute which denies state funding and
11 also, does not require the districts to accept children
12 under these circumstances.

13 The state's statutes, I believe, would not be
14 in question because of the district's particular policy
15 of whether or not they pay tuition.

16 QUESTION: I know. But this district's policy
17 is to accept tuition. This statute is being
18 administered in this district on the basis that you may
19 come here solely for an education if you can pay the
20 tuition.

21 MR. ARNETT: That is undoubtedly correct, Your
22 Honor. This is also a case where the plaintiffs amended
23 their pleadings to drop any allegations concerning the
24 merit of the statute's application in McAllen, and the
25 attack is on the statute on its face. And the statute

1 on its face does not say a word about tuition. That was
2 my point.

3 I would question what interest would support
4 any state statute, even requiring residency, even
5 requiring this de facto residency. What interest would
6 a school district have from having a child come in every
7 day and go to school? What interest would the state
8 have in preventing that, other than the interests assure
9 -- that are underneath and underlie 21.031(d)? I
10 believe it's entirely the same interests.

11 The interests are that the child is part of a
12 family unit, it is part of the democratic unit of that
13 locale and are participants in the economy and in the
14 political process, if they're citizens, for example, and
15 all of the normal indicia and all the normal attributes
16 of participating in a democratic system.

17 It's also obviously, to prevent people from
18 jumping around the state for whatever reasons. It could
19 be because there's a football powerhouse and this fellow
20 wants to get a scholarship at Notre Dame, so he wants to
21 go play for this particular coach that has connections
22 at Notre Dame. That undoubtedly will arise.

23 There's certainly ample basis under the
24 statute for the Texas statute, and indeed, the approach
25 --

1 QUESTION: May I interrupt you for kind of a
2 general question? Your opponent has said there are
3 difficulties about getting a guardianship, and if you
4 have a guardianship even for terminating it. Is it
5 expensive, and is it as much of a problem as your
6 opponent indicates? Do you accept his representations
7 about that?

8 MR. ARNETT: I think it would be fair to say
9 that every child in McAllen could have a guardian
10 appointed for him with the amount of money Legal Aid
11 spent bringing this case up to the Supreme Court.

12 QUESTION: Well, yes, but this is not a
13 typical --

14 MR. ARNETT: It is not exorbitant. We have
15 pauper zones in Texas, we have legal services
16 available. It is not difficult.

17 QUESTION: But is there a procedure for having
18 a guardian appointed for an indigent?

19 MR. ARNETT: Well, once again, our statutes
20 require that an application for guardianship show the
21 necessity for the appointment of a guardian.

22 QUESTION: Supposing in this very case the
23 sister came in and said she wanted to be appointed the
24 guardian so the child could go to school.

25 MR. ARNETT: Well, according to the

1 plaintiffs, in one case out of Brownsville, it was
2 refused on that basis. That was not deemed to be a
3 sufficient reason. And there are cases from other
4 states where it's been refused also on that basis
5 because it's an intentional frustration of the intent of
6 the residency statute. And --

7 QUESTION: So we should take this case on the
8 assumption that this child could not have obtained a
9 guardianship. Of course, I realize it's not an
10 as-applied case.

11 MR. ARNETT: No, couldn't do that because --

12 QUESTION: We must take the case on the
13 assumption that there are a significant number of
14 children who could not get guardianships in Texas but
15 who want to live with their sisters or some similar
16 custodian.

17 MR. ARNETT: For the purpose of going to
18 school? I don't even know if you can be safe in that.
19 I'm just saying there's been one case where a probate
20 court refused it. There are no appellate cases on the
21 subject as to whether this would be deemed sufficient
22 reason for appointment of a guardian. So that's really
23 an open question under Texas law.

24 I would argue, if I were, in fact, in state
25 court on the question and representing a school

1 district, I would argue that the obvious intent of the
2 legislature is that you don't frustrate the requirements
3 of the residence statute by letting guardians be
4 appointed when there's no necessity. And the only
5 reason they want a guardian is so they can go to school.

6 QUESTION: Does the custodian have the same
7 decisionmaking authority as a guardian would?

8 MR. ARNETT: No, Your Honor, he doesn't. The
9 guardian's powers are co-extensive to what we call
10 managing conservator, which are co-extensive with the
11 parent. A custodian has a few narrowly-specified powers
12 granted to him in the statute more out of necessity than
13 anything else. He has the power to consent for medical
14 treatment, for example, and that's obviously a necessity.

15 I don't really think that the ability of the
16 custodian to consent is a major issue in this case. I
17 don't really believe that's one of the major
18 underpinnings of the statute -- whether or not the child
19 is with a responsible adult, and I don't think that will
20 be the major underpinnings in any state residency
21 statute because they're all apt to allow the same type
22 of system.

23 QUESTION: It would seem to me you might have
24 a problem if an American citizens says I want to live in
25 this county for whatever reason, I have a right to do

1 that, and I would like to have a guardian appointed who
2 can make decisions for me because I'm only 12 years old
3 or 11 years old. And Texas might say well, we won't do
4 that because a consequence of that might be then you
5 might get to go to school. Is that your position?

6 MR. ARNETT: Now, I think if he needs a
7 guardian appointed for him to exercise his rights --

8 QUESTION: Just because he's 12 years old and
9 that's where he wants to live.

10 MR. ARNETT: And to exercise his rights. Then
11 he undoubtedly will get a guardian appointed. We even
12 have a provision for out-of-state residents to have a
13 guardian appointed where they have property in the state
14 and some reason for it. So if he just needs a guardian
15 because his parents are back in Mexico and he seeks a
16 guardian in order to have someone to represent him
17 contractually, et cetera in the state, undoubtedly he'd
18 be able to get one appointed.

19 QUESTION: Even though the only reason he's
20 there is he hopes after this guardianship has been
21 appointed, he'd like to go to school there.

22 MR. ARNETT: If they're as clever as you are,
23 they're going to beat the system.

24 (Laughter.)

25 QUESTION: It doesn't take -- you're not very

1 clever to figure that one out.

2 MR. ARNETT: Well, I just point out that if
3 the guardian -- if the probate court was satisfied that
4 the only purpose for the appointment of a guardian was
5 to establish school residency, I can't promise this
6 Court that a guardianship would be granted. Now, if he
7 has some other legitimate reasons, then it's highly
8 unlikely it wouldn't be granted.

9 It's much the same as Judge Garza and Judge
10 Case and both district judges that reviewed the facts in
11 this case and reviewed the reports filed by the district
12 said, that the way the district applies this, although
13 it's not before the Court, is quite liberal. And if
14 they can find another reason for the child to be here
15 other than to take advantage of school, they'd let him
16 in. I think the same type of thing is going to --

17 QUESTION: I must confess I have a lot of
18 difficulty understanding a facial attack on a statute
19 brought by a litigant, and we don't care how the statute
20 applies to the particular litigant. It's a very
21 puzzling constitutional posture for a case of this kind,
22 for me. Maybe I just have a problem that others don't
23 have.

24 MR. ARNETT: Well, in terms of the way the
25 statute applies to this particular litigant even, their

1 argument could only be that the state has a
2 constitutional duty to discriminate in his favor,
3 because it seems to me beyond doubt that Texas can avoid
4 the problems, both short term and long term, in terms of
5 their effect on school districts and their control, from
6 students hopping around different parts of the state,
7 from students going from Dallas out to the suburbs, from
8 students going from Houston to Austin even. And from
9 students going from Louisiana into Texas.

10 Although that's interstate travel, it's
11 certainly not the same type of interstate travel this
12 Court was dealing with in Shapiro and Gaddis, which
13 involved a bona fide change in residence on the part of
14 a family. I don't think it's debatable.

15 QUESTION: In Texas, do you have any problems
16 from students from any other state other than the
17 government of Mexico? In Texas.

18 MR. ARNETT: No, there's nothing in the record.

19 QUESTION: Isn't that your only problem?
20 That's what they told us in this other case.

21 MR. ARNETT: Well, we talked -- that's the
22 only place where we've got illegal aliens from, Your
23 Honor. But in terms of the potential for students
24 coming in, I think you'll find East Texas Guidance
25 Center versus Brockett deals with students from

1 Louisiana. I think that you'll find that --

2 QUESTION: How many would that encompass?

3 MR. ARNETT: That was a particular child care
4 institution there.

5 QUESTION: That's A-1, where you have hundreds
6 and thousands of Mexicans, right?

7 MR. ARNETT: Well, the testimony of the
8 superintendents in this case was that there will be
9 thousands come in from interstate or international.
10 They didn't differentiate. As to the numbers, there's
11 nothing in the record, Your Honor, to support a
12 conclusion as to what the major effect of this statute
13 is.

14 QUESTION: And there's nothing in the record
15 on hopping, either, is there?

16 MR. ARNETT: There's certainly plenty in the
17 case law on that.

18 QUESTION: But there's nothing in this case.

19 MR. ARNETT: No, Your Honor, but I would
20 indicate that --

21 QUESTION: And this petitioner didn't hop to
22 but one place. He only made one hop.

23 MR. ARNETT: Well, I imagine the other ones
24 would only make one hop, too.

25 QUESTION: Mr. Arnett, you and Justice

1 Marshall were talking about moving from Mexico to Texas
2 or from state to state, but this statute applies to
3 moving from district to district, does it not?

4 MR. ARNETT: Yes, Your Honor. Strictly
5 speaking, the statute does not relate to interstate
6 travel at all; it relates to inter-district travel or
7 coming in -- or actually, it doesn't relate to travel at
8 all. It relates to the reason for your presence in a
9 district.

10 Now, you may have been in that district since
11 you were born, you may have come from a neighboring
12 district, you may have come from Louisiana, from Mexico
13 or from Peru.

14 QUESTION: Do states in remote areas so far as
15 Mexico is concerned have similar laws? What about North
16 Dakota?

17 MR. ARNETT: Well, for example, New Hampshire
18 has the same law. North Dakota I'd have to check in my
19 brief and see which one they have.

20 QUESTION: They have the same law for what
21 purpose? To keep Mexicans out?

22 MR. ARNETT: Obviously not. Obviously, in
23 1851 when New Hampshire Supreme Court set this rule, it
24 was to preserve school districts, and to prevent --

25 QUESTION: Do you deny that this one was to

1 keep Mexicans out?

2 MR. ARNETT: Yes, Your Honor, I deny that.

3 QUESTION: Give me what proof you have.

4 MR. ARNETT: Because it's been a doctrine in
5 Texas law since 1903.

6 QUESTION: And there were no Mexicans in 1903?

7 (Laughter.)

8 MR. ARNETT: And the case came up in 1905 --
9 this was at a time that, you have to remember, that the
10 state also educated any Mexicans that came in and it had
11 no rules against educating illegal aliens. So on that
12 basis, I think I'm fairly sound in saying that it was
13 not aimed at them.

14 The attorney general's opinion concerning
15 Rockdale makes no mention in 1905 -- apparently, it was
16 farmers. Now, it does not make a mention as to the race
17 of the children involved.

18 QUESTION: I thought we had a district court
19 finding in this case on the purpose.

20 MR. ARNETT: You have a district court finding
21 that one purpose of the statute was to impede people
22 coming in from Mexico to go to school.

23 QUESTION: Don't we have to accept that?

24 MR. ARNETT: Well, I think you can look at the
25 factual underpinnings of it because the district court

1 fell victim to what this Court rejected in O'Brien,
2 United States versus O'Brien. The district court used
3 the expression of one, single legislator who was not
4 even a sponsor of this bill. And when you read what he
5 said, coupled with the language of the statute, at most
6 his intention was to do what the statute does, and that
7 is keep people from coming in --

8 QUESTION: But in the posture that this case
9 is here, don't we have to accept that finding?

10 MR. ARNETT: No, Your Honor, I don't believe
11 you do. And also, I would point out that the district
12 court made another finding, that the main purpose was to
13 provide a statutory guideline of residency. That was
14 the district court's first finding on it, and it said a
15 purpose, one purpose, was --.

16 Now, if you look at the factual underpinnings
17 of that in order to understand what the district court
18 was saying, what it was really saying is that we had one
19 legislator down there in Austin who said this. That's
20 the evidence. The other legislator whose testimony is
21 in the record was the sponsor and said primarily, it was
22 to codify the attorney general opinions.

23 QUESTION: The district court also mentioned,
24 as I recall, counsel, the state's interest in the tax
25 burden, so that children couldn't choose districts

1 without having parents or guardians who contributed to
2 that -- who helped relieve the tax burden. District
3 court mentioned that, didn't it?

4 MR. ARNETT: The district court has a finding
5 that children like this do not generally pay taxes, and
6 the cost of their education will have to be borne by the
7 bona fide residents of that district.

8 QUESTION: And the district court also
9 mentioned the importance of school boards being able to
10 plan from year to year as to pupil-teacher ratio, load,
11 et cetera, didn't it?

12 MR. ARNETT: He talked about overcrowding, he
13 talked about the inter-district transfers and how they
14 would disrupt the educational system. He concluded with
15 a finding that in all likelihood, if this statute did
16 not exist it would be detrimental to the educational
17 standards of the school districts of Texas. And that
18 finding was affirmed by the Fifth Circuit.

19 Now, I would like to get back to this
20 motivational approach because it seems to me that that
21 is a rather interesting point in this case. You don't
22 have a disparate impact. This statute applies equally
23 to everyone. It in no way has a different effect on one
24 group of persons than any other group of persons.

25 As such, it seems to us that United States

1 versus O'Brien, Palmer versus Thompson, Brown versus
2 Califano which was quoted in the proffered case last
3 term, all say that you don't look at motive.

4 But in any event, the motive factually, the
5 district court found the dominant motive was to codify
6 or to provide a statutory definition of residence.
7 Previous to that, it had merely been common law as
8 indicated by the attorney general opinions in the DeLeon
9 court.

10 Now, we have used in Texas precisely the
11 standard this Court set forth in Vlandis versus Kline
12 for determining bona fide residency. This purpose test
13 was also used in Sosna versus Iowa, it is used in Starns
14 which was affirmed by this Court, it was set forth in
15 various decisions of the lower courts on the same issues
16 such as the Spriggs case and the Zoben case.

17 We have used what we believe to be the best
18 system. We don't see where Colorado's system is as
19 good. They require the child to intend to reside there
20 indefinitely. Well, he may not need to reside there
21 indefinitely for his health reasons or whatever brought
22 him there.

23 This also, I would point out, allows us to
24 have a workable system for the education of handicapped
25 children. Under a de facto residency approach, which

1 analytically is the only thing one could go to to strike
2 this statute, and a temporary de facto at that, if
3 Houston were to place a child in Austin at a residential
4 facility for the purposes of an education, he's paying
5 \$100,000 a year, upon his arrival to Austin he'll become
6 a resident of Austin and Austin will become responsible
7 for that \$100,000 a year. It doesn't make a lot of
8 sense.

9 By the same token, -- and that is one reason
10 we have the disqualification concerning educational
11 purposes, or that's one end that it serves. On the
12 other side of the coin, we have things called ICFMRs,
13 Intermediate Care Facilities for the Mentally Retarded,
14 where parents place children; they've never taken the
15 kid to the home district. The home district's never had
16 a shot to see if they could provide an appropriate
17 education for this kid, but the kid may be 500 miles
18 across the state in an ICFMR.

19 By regulation, we have required the district
20 where that ICFMR is located to provide an education to
21 those children, so long as they are not there for an
22 education, primarily for educational reasons.
23 Otherwise, we would have a very difficult time
24 delivering services to those children because the
25 district of responsibility would be 500 miles away and

1 never have seen the child.

2 Our system works very well in Texas for a lot
3 of different reasons. It works very well in a number of
4 other areas for a lot of different reasons. It's the
5 common law of this country in school residency matters.
6 And we also believe it should be upheld as
7 constitutional.

8 CHIEF JUSTICE BURGER: You have two minutes
9 remaining, Mr. Tuddenham.

10 ORAL ARGUMENT OF EDWARD J. TUDDENHAM, Esq.

11 ON BEHALF OF THE PETITIONER -- REBUTTAL

12 MR. TUDDENHAM: Thank you. Just to quickly,
13 with respect to the facial challenge and the fact that
14 this is a county residence statute, this complaint in
15 this case was patterned on Maricopa County versus
16 Memorial Hospital which was also a facial challenge to a
17 county residence statute struck down on international --
18 because it had an effect on interstate travel.

19 In the final minute, I would just like to
20 reiterate to this Court that --

21 QUESTION: Let me just ask one other question
22 about that, if I may. Is it correct, then, that the
23 case as it comes to us is exactly the same as the
24 hypothetical involving the wealthy family abroad who
25 want their child to go the school without paying tuition?

1 MR. TUDDENHAM: The plaintiff before the Court
2 is a child from Mexico; he is the -- this is not a class
3 action. It's --

4 QUESTION: No, but the issue -- if we're not
5 concerned with the impact on the particular litigant, is
6 the constitutional issue is the same as the hypothetical
7 case I posed?

8 MR. TUDDENHAM: I do not believe so. The
9 issue before the Court is the facial impact of this
10 statute on Roberto Morales. That's how it was litigated
11 in the district court, and that's how it was defended.

12 (Laughter.)

13 QUESTION: I don't understand that.

14 QUESTION: That's hardly a facial attack.

15 MR. TUDDENHAM: Well, that was the way it was
16 litigated in the district court -- .

17 QUESTION: We could give you all the relief
18 you wanted by just saying that insofar as this statute
19 impacts on -- has an impact on your client, it's
20 unconstitutional. And you would -- is that all you want?

21 MR. TUDDENHAM: Insofar as it prevents
22 children who have no other choice and who need an
23 education, this is their only choice for an education in
24 the United States --

25 QUESTION: But this record --

1 QUESTION: That would include Justice Stevens'
2 example.

3 QUESTION: Yes, and I don't think this record
4 shows -- you correct me if I'm wrong -- that this
5 particular child could not have had a guardian appointed
6 for him.

7 MR. TUDDENHAM: The record shows that he is
8 indigent, and a guardian --

9 QUESTION: Well, the record doesn't show that
10 he ever applied for a guardianship, or had his sister
11 apply for a guardianship and was turned down.

12 MR. TUDDENHAM: His parents were afraid of
13 giving up permanent custody of their children.

14 QUESTION: Well, the record doesn't show that
15 she couldn't have tried that route, does it?

16 MR. TUDDENHAM: But she is indigent and it
17 requires a bond of up to \$1000 to be posted.

18 QUESTION: Well, they apparently posted a bond
19 to go to school, according to your opponent.

20 MR. TUDDENHAM: The bond was --

21 QUESTION: We don't know the facts as to the
22 particular litigant, is what I am saying.

23 MR. TUDDENHAM: Excuse me?

24 QUESTION: We don't know the impossibility of
25 this litigant attending this school by some other means

1 because you haven't tried out all the aspects of the
2 impact of the statute on this litigant.

3 MR. TUDDENHAM: But it is clear that this
4 statute is and was designed to create an expanding class
5 of American citizens, whose parents are in Mexico who
6 have no other place they can go to school, but who have
7 a right even now as citizens to live in the United
8 States. So, does he live here and not go to school?

9 QUESTION: Well, they can go to school in
10 Mexico. You just say they won't get the education they
11 think they'll get in the United States.

12 MR. TUDDENHAM: If I may respond to that,
13 Justice White, just last year Mr. Arnett, in Plyler
14 versus Doe, told this Court that there are over four and
15 a half million children of school age in Mexico who are
16 not attending school because of inadequate facilities in
17 Mexico. So there is no guarantee that this child can
18 get any education --

19 QUESTION: Does that mean that Texas should
20 support them?

21 MR. TUDDENHAM: Not the children of Mexico,
22 but this child as a United States citizen. He has a
23 right to establish a home in the United States today.
24 He can't be deported by the state of Texas. He has a
25 right to live there. Thank you.

1 CHIEF JUSTICE BURGER: Thank you, gentlemen,
2 the case is submitted.

3 (Whereupon, at 1:45 p.m., the case was
4 submitted.)

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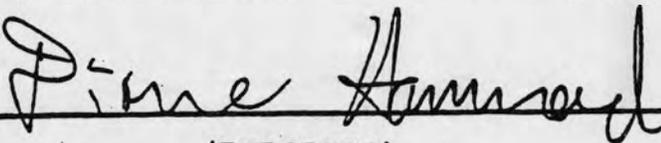
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Oralia Martinez, as Next Friend of Roberto Morales, Petitioner
v. Raymon L. Bynum, et al - No 81-857

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